PROCEDURAL LAW REFORM

IT IS said that under our present practice, no matter how just the verdict and judgment of the court below may be, no lawyer can guarantee that his case may not be reversed by the Supreme Court. Is this criticism well-founded in fact; and, if so, is it a reflection upon our present methods of legal procedure?

The statisticians tell us that no less than twenty per cent. of all the cases taken to our appellate courts relate to questions of practice, and that throughout the country in forty per cent. of these cases new trials are granted. In our own State about fifty per cent. of all cases taken to our Supreme Court are reversed, and this seems to be the general average throughout the country. It would seem, therefore, that to be "a weed-puller in the judicial garden," as Judge GROSSCUP puts it, is more potent and powerful (to continue the figure) than to be a tiller of the soil and a planter of the crops, and that the complaint as to uncertainty of results in our appellate courts has some basis in fact. But it does not follow that such a condition necessarily reflects discredit upon our present system. I am not one who believes that our system is wholly bad, as the language of some of the extreme reformers would seem to indicate, nor free from faults as many conservatives maintain. Justice has generally been done in this country; the courts of our land, aided by an intelligent and progressive bar, have, with rare exceptions, quietly, without ostentation and with the spirit of true patriotism, administered the law in such a way as to protect life and property, preserve business interests, and maintain that social equilibrium essential to our welfare and progress. Few men escape the just penalty of the law.

The law naturally divides itself into two great branches: one which defines legal rights and duties, called substantive law, and the other which prescribes the means whereby these rights and duties are established and enforced, called adjective or procedural law, with its branches of pleading, practice, and evidence.

There is no general or widespread criticism of our substantive law. The motives that lead men into organized social bodies established automatically the standards of right and of wrong, of right and of duty. As new social conditions arise, new rights and new duties are created and formally declared. Our substantive law, however, always follows and never precedes public opinion. Its history has been one of development and growth, following closely the ultimate demands and needs of the people. It is that upon which our civilization is built and our progress depends. It is not

a fixed and inflexible science, as some would have it, but a philosophy changing with changed conditions through the years.

On the other hand, our procedural law is but a means to an end—the machinery by which our basic principles of right and duty are put into operation and effect. The fact that in the opinion of many this branch of our law has not kept pace with the progress and development of our substantive law, is the cause of complaint and the basis of the present movement for reform.

This movement for reform is but fairly started. It is in its formative period, with varying views as to what should be done. I do not believe its progress can be stayed by the opposition of the most conservative elements of our profession, nor by the efforts of the most insistent sticklers for form and ceremony.

Reforms, however, cannot be accomplished at once. Our present methods are too firmly established to be eradicated in a day. When they come they must be brought about through the processes of evolution. They must build their way into and become a part of our social life. When accomplished it must not be expected that they will be a panacea for all the evils, existing or imaginary, of our present system, or that criticism of our courts and of the administration of justice will thereby cease. Back of all systems of law or procedure are the judges, the lawyers, and the litigants, whose character and personnel must be depended upon to make any system, judicial or otherwise, however perfect in form, even tolerable.

Ultimately I believe the varying views with respect to procedural reform will be harmonized, clarified and classified into a complete, simple and satisfactory system. I am led to this conclusion (1) by the character of the men and the organizations now giving their time and influence to the movement, and (2) by the fact that in many instances some changes at least in our present methods of procedure would aid the courts in a speedier and more satisfactory administration of the law.

1. What has been and is now being done for procedural law reform, and by whom? President TAFT, Senator ROOT, and many others high in office and influence, have declared emphatically in the press and in public speech that our present system of procedure is archaic and should be changed. The American Bar Association, than which there is no more able, conscientious, and patriotic body of men in this country, has maintaineed for some time what is practically a standing committee on the delays and expense in legal procedure. The keynote of the whole subject is found in the bill prepared by that association and recently passed by Congress, applicable, however, only to the Federal courts, reading:

"No judgment shall be set aside or new trial granted by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case, it shall affirmatively appear that the error complained of resulted in a miscarriage of justice."

This is substantially the substance of the provision relating to appeals found in the English Judicature Act passed by Parliament in 1873, and is the rule now in force in a number of States in this country, notably New York, Massachusetts, New Hampshire, Wisconsin, Kansas, Montana and Oklahoma.

The American Institute of Criminal Law and Criminology, composed of leading judges, lawyers, educators, scientists and thinkers of this country, holding its meetings annually and maintaining a standing committee, with various sub-committees on the subject of law reform, has been and is still doing a tremendously telling work along this line.

The National Civic Federation at its conference held in Washington in June, 1910, created a standing committee on reform in legal procedure with instructions to co-operate with the committee of the American Bar Association having the same subject in hand. At its meeting held in Chattanooga in August, 1910, this committee adopted resolutions recommending specific reforms in our criminal procedure which, it was believed, would shorten our trials and bring about more certain and absolute justice to both the accused and the State.

The Congress has been devoting a great deal of time to the reform of federal procedure and a commission has been appointed to prepare a complete new practice act.

In Massachusetts the commission appointed to consider the delay in the administration of justice, recently made its report with recommendations as to what are believed to be needed reforms.

In New York a committee of the Bar Association of New York City has put forth a printed report on the simplification of procedure.

Kansas has adopted, at the instance of the State Bar Association, a revised code of procedure which embodies many reforms.

In California the Bar Association of San Francisco recently brought about many important changes and reforms in the criminal procedure of that State.

In a recent notable address before the State Bar Association of Mississippi Justice ROBERT MAYES, of the Supreme Court of that

State, took occasion to call attention to what he believed to be some of the "absurdities to which the courts have been driven in order to effectuate certain constitutional requirements in the methods of criminal procedure, and which only serve to defeat and not to promote the ends of justice."

At the annual meeting of the Illinois Bar Association in June, 1910, the subject of legal reform was the principal topic of discussion, and the report of the special committee covered what it believed to be the general principles which should control in the introduction of any scheme of procedural reform.

At the annual meeting of the Alabama Bar Association held in Mobile July 13, 1910, this subject received extended and thoughtful consideration. Mr. C. B. VERNER said in an address:

"I have examined about seventy-five murder cases that found their way to the Supreme Court and reported in random volumes 100 to 160 of the Alabama reports. More than half of these cases were reversed, and not a single one of them on any matter that went to the merits of the case; and very few of them upon any matter that could have influenced the jury in reaching a verdict."

President HATTON W. SUMMERS, in a recent address before the District and County Attorneys' Association of Texas, entered a vigorous protest against what he called the "ever increasing tendancy of legislation and judicial construction, which, under the guise of protecting individual liberty, is rendering more difficult and uncertain the conviction of the criminal, and which is more and more neglecting the rights of our decent, law-abiding citizen." Some very interesting statistics are given in this address. In the years 1903-04 there were 12,044 indictments for felony in Texas. Of these 5,060 were dismissed and 4,654 tried. Of the number tried 1,475 were acquitted and 3,179 convicted. 381 of the cases in which convictions were had were appealed to the Supreme Court, 156 (or 51%) of which were reversed, many by a divided court.

Ex-Governor THOMAS of Colorado, in a recent address before the Iowa Bar Association, declared that "indictments which vary the breadth of a hair from the established formula, in statement, punctuation, the use of a capital for a small letter, the omission of an article, upset the most carefully conducted trials, reverse verdicts of unquestioned integrity, cheat justice of its dues, and defeat results fairly obtained through infinite labor and expense."

The laymen of our country and the members of the bar alike join in universal criticisms of the kind already indicated. The severest critics, however, are the members of the bar itself. Proof of this fact is found in the recent addresses of Justice HENRY B. BROWN,

Attorney General WICKERSHAM, FREDERIC W. LEHMANN, EVERETT P. WHEELER, ROSCOE POUND, SAMUEL SCOVILLE, Professors WIGMORE and LAWSON, FRANK B. KELLOGG, and scores of others, representing what is believed to be the progressive spirit of our profession.

It is also a significant fact that many of our appellate courts themselves are beginning to show notable signs of liberality in judicial decisions on questions of practice.

In the case of *People* v. *Gilbert*,[1] Justice VANN uses the following language: "Technical objections are no longer regarded as serious, unless they are so thoroughly supported by authority that they cannot well be disregarded, even under the latitude of the statute relating to the subject."

In *Post* v. *Brooklyn Heights R. Co.*[2] the New York Court again applies the doctrine of "harmless error."

In *Parb* v. *State*[3] the Supreme Court of Wisconsin refused to follow the doctrine that is wedded to technicality.

The whole subject is completely covered, with the freshness and virility of youth, by the Supreme Court of Oklahoma in *Byers* v. *Territory*[4] in which the court say: "The more we reflect upon the doctrine of harmless error, the more clearly we see that it is in strict harmony with the philosophy of the law, and that its recognition and enforcement by the appellate court is absolutely necessary for the administration of justice."

In *Caples* v. *State*[5] the same court say: "We will give full consideration to all authorities which are supported by living principles and will follow them when in harmony with our laws and the conditions existing in Oklahoma. But we must confess to want of respect for precedents which were found in the rubbish of Noah's Ark and which have outlived their usefulness, if they ever had any. When the reason for a rule ceases, the rule should cease also."

In *State* v. *Byrd*[6] the Supreme Court of Montana, referring to the penal code of that State which provides, in substance, that no reversal shall be had for technical errors or defects not affecting the merits, used the following language: "Under that provision prejudice ought not to be assumed from the showing of error, as was the rule before the enactment of the above law. Under the old

[1] 199 N. Y. 10.
[2] 195 N. Y. 62, 87 N. E. 771.
[3] 143 Wis. 561, 128 N. W. 65.
[4] (Okla.) 103 Pac. 532.
[5] (Okla.) 104 Pac. 493.
[6] 41 Mont. 585, 111 Pac. 407.

practice there were altogether too many reversals for technical errors, and the purpose of the amendment to the penal code was to do away with the rule of presumed prejudice. It is for the Supreme Court under the new rule to determine whether an error affects the substantial rights of the accused, and in this case it did not appear that the error had any such effect."

No less trenchant is the language used in the opinions of some of our Federal Courts before the passage of the Federal Act already referred to. In the case of *Holt* v. *United States*[7] decided October 31, 1910, technical objections, not affecting the merits, were brushed aside as of little weight by Mr. Justice HOLMES, who wrote the opinion of the court.

In *Pariso* v. *United States*[8] the same Justice used this significant language "The bill of rights for the Philippines giving the accused the right to demand the nature and cause of the accusation against him, does not fasten forever upon those Islands the inability of the seventeenth-century common law to understand or to accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert."

In the case of *Press Publishing Co.* v. *Montieth*[9] Judge COX, of the United States Circuit Court of Appeals, delivered a remarkable opinion in repudiation of the rule of presumed prejudice. He said: "Prejudice must be perceived; not presumed or imagined. The object of all litigation should be to arrive at a just result, by the most direct, speedy, and inexpensive proceedings. If such a result can be reached by absolutely inerrant methods, so much the better; but while the administration of justice is in the hands of merely finite beings, such perfection can hardly be expected."

It is to be noted, however, that when reforms have been attempted in this country they generally, and until very recently, have been construed by our appellate courts in the light (or darkness) of the older common law rules of construction. Such an attitude is but the natural expression of the historical temper of the judicial officer. Conservatism and pride of precedent dominate his mind; a most estimable and indispensable quality, but some times likely to be used to the detriment of progress.[10] This is illustrated by the attitude

[7] 218 U. S. 245, 31 Sup. Ct. 2.

[8] 207 U. S. 368.

[9] 180 Fed. 356.

[10] In view of the technical decisions of Alabama, the language of Judge Evans of the Supreme Court of that State, is interesting as indicating the general attitude of many members of the bench and bar toward reform. Judge Evans is quoted (71 Cent. Law Jour., 327-9,) as saying: "Our system of pleading is like an exogenous plant, whose capacity for multiplying limbs is only limited by the climate and the fertility of the

of the Supreme Courts of Missouri and Wisconsin. Over fifty years ago the Missouri Legislature passed a statute providing that "no indictment shall be deemed invalid, nor shall a trial or judgment be stayed or altered, for any defect or imperfection which did not tend to prejudice the rights of the defendant upon the merits."

The Supreme Court of that State many years later, in construing this statute, said, in substance, that it could not have been the intention of the legislature to entirely abolish the old criminal technicalities, saying: "To give so liberal and latitudinous a construction would undoubtedly destroy many, if not all, of the forms which have been hitherto observed."

In Wisconsin it has taken half a century for the courts of that State to fall into harmony with the spirit of the code adopted under the constitution of 1848, into the liberal provisions of which both lawyers and judges continued to incorporate the technicalites of the common law. Not until quite recently has the Supreme Court of that State caught the spirit of that early act. In the opinion filed in *Hack* v. *State*[11] Justice MARSHALL said of it: "We do not to this day fully appreciate the great judicial revolution intended by it, rendering justice more certain, more speedy, and more economical of attainment. Appreciation of the intended change has come about so slowly that after fifty-three years we are quite far from fully comprehending its beneficent purpose."

Wisconsin may now be said to be following, in a measure, the spirit of this early act; but it required first a special act of the legislature (Chap. 192, Laws of 1909) challenging the court's attention to it, and placing the burden upon the party alleging error to show affirmatively that it affected his substantial rights. The act may now be said to be respected and followed,[12] although with reluctance, as shown by the dissenting opinion of Justice TIMLIN in the case last cited.[13] Nor does that court seem to be altogether consistent.[14]

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soil. * * * What the system should be in this State could, in my opinion, best be devised, after a most thorough investigation into the workings of the different systems of pleadings of the different States and countries of civilization, by a body of men most learned in the law and altruistic in character. It may be true that the common-law system has its snake heads, but it seems to me that in nearly every instance where one has been cut off by our legislature, two have grown out to take its place. Do I object to the system? I can't say that I do. While as a citizen and a judge I deplore it, yet as a lawyer and dialectitian I rejoice in it. As a means for the administration of justice, its efficacy is to be doubted; while as an intellectual gymnasium its appointments could scarcely be improved upon."

[11] 141 Wis. 358.

[12] State ex. rel. McGovern v. Williams, 136 Wis. 1; Hack v. State, 141 Wis. 353.

[13] The dissenting opinion of Justice Timlin is unique as indicating the tenacity with which the judicial mind clings to, and its lament at the passing of, the old rules of construction. He says: "Now it may be that these precedents deserved this fate. They

Missouri, however, is still drifting far afield; for in the recent case of *State* v. *Campbell*[15] the Supreme Court of that State quashed the proceeding and released a man unquestionably guilty of a dastardly crime because the word "the" was omitted from the indictment in the clause "against the peace and dignity of the people of *the* State," notwithstanding the provision of the Missouri statute already quoted. In a case similar to this in Wisconsin,[16] the Wisconsin Supreme Court early said of this clause, in sustaining a conviction: "This formula is a mere rhetorical flourish, adding nothing to the substance of the indictment, and it is difficult to see why the mandate for its use was inserted in the constitution. * * * * Of course the accused cannot be possibly prejudiced or in any manner misled by the omission of the formula from an indictment."

But enough, perhaps too much, has been said to show the universality of the movement for procedural reform, and to justify the assertion that nothing can stay its progress until some definite and feasible plan is evolved from the agitation now in progress.

2. There has been more or less superficial, exaggerated, and unfounded talk upon this subject, as will always be the case in every great movement, much of which has tended to confuse rather than to aid the mind in the solution of the problems presented; but beneath it all there is, it seems to me, the kernel of truth, which it is the business of sincere and patriotic men to discover and apply to the ultimate good of the people.

The criticisms have been varied, touching almost every phase of our procedure; but, summarized, they relate chiefly to the alleged delays and to uncertainty of results in our civil and criminal proceedings, particularly the latter. These delays and uncertainties are brought about, it is claimed, from at least two causes: (1) the

perhaps deserved death in order that we all might live. They were certainly guilty of being old. They were not innocent of having been born at the wrong time. They perhaps distracted the Circuit Judges in the consideration of fine scholastic distinctions concerning lack of ordinary care by intruding upon them some rude, practical experience in the exercise of ordinary care. Like primeval man before his fall, unconscious of sin, they neglected to cover themselves with foliage. They obtruded their classical clearness and simplicity against the turgid toploftiness which closed the nineteenth and began the twentieth century. They failed to stand for any corporate privilege or advantage. For all this they perhaps deserved amortization. But before Oblivion's curtain falls upon them forever, let me say that in my youth, before professional success and competence and a seat on the supreme bench had their value impaired by realization, and while such things were bright with the glamour of anticipation, these precedents seemed to me profound in their wisdom, unimpeachable in their authority, and clear, definite, and correct in their doctrine. Mentors of my brighter days, farewell!"

[15] Schultz v. State, 135 Wis. 644.

[15] 210 Mo. 202, 109 S. W. 706.

[16] Nichols v. State, 35 Wis. 308.

cumbersome methods of our pleading and practice and the application of technical rules of construction in relation thereto, and (2) the almost universal rule of our appellate courts to presume prejudice from error and to send back cases for a new trial on account thereof, without due regard to the merits of the case.

To my mind there is clearly both an historic and a philosophic basis for so widespread a movement for reform.

The common law became ours by right of heritage and adoption at the time we became an independent nation one hundred twenty-five years ago, and more. With it we took over the procedure of the English courts of that time, to which, in large measure, we have adhered ever since.

English procedure very early ceased to develop. From the thirteenth to the eighteenth centuries proceedings in courts of law, both civil and criminal, were conducted with very little modification or change. From the sixty (or thereabouts) different writs authorized by Parliament, the litigant was bound, at his peril, to select the appropriate remedy. If he failed in this, his action failed, whatever might have been the merits of his case. A right might exist, but unless there was an appropriate writ, there was no remedy. This condition gave rise, as is well known, to the development of the chancery court, which, as BLACKSTONE says, was to remedy those evils "wherein the law, by reason of its universality, is deficient."

First the appeal was made to Parliament, but without avail, and then to the King, and the King turned the matter over to his chancellor, who, in time, constituted himself a court of equity to administer a code of morals rather than of law. However simple the proceedings in equity may have been in the beginning, before the end of the seventeenth century they had become even more technical and complicated than proceedings in the courts of law.

It was not until near the end of the eighteenth century that any substantial reform was made in English procedure. Through the herculean efforts of JEREMY BENTHAM, which Lord BROUGHAM later took up, the reform movement was carried to fruition in the early part of the ninteenth century by securing from parliament the appointment of a commission, consisting of great lawyers and jurists, to consider the question of law reform. This resulted as early as 1823 in the passage by Parliament of various reform acts, and from time to time thereafter, until finally in 1873 was passed what is now known as the English Judicature Act, comprising the net results of a century's earnest and conscientious work of the ablest men of the British Empire.

This act repealed all old forms of action, abolished the distinction

between law and equity, simplified proceedings, and gave the courts authority to frame their own rules of procedure. Written pleadings were made unnecessary, an endorsement upon the writ or summons of what the suit was about being sufficient.

Here is a sample of all a plaintiff is required to set out in an action for breach of promise to marry:

"December 27, 1906, defendant verbally promised to marry plaintiff. August 3, 1907, he married another woman. Plaintiff claims damages—one thousand pounds."

Here is a claim against a railroad for personal injuries:

"Plaintiff claims five hundred pounds for injuries sustained by him on May 5, 1906, while traveling on defendant's railroad as a passenger from London to Bristol, such injuries being caused by defendant's negligence."

And this would be a sufficient indictment for murder in England: "The grand jury charges that on the 1st day of January, 1911, in the county of Z., A. B. did kill and murder one C. D., against the peace of our Lord and King, his crown and dignity."

In Canada this is all that is required in an indictment for murder: "The jurors of our Lord and King present that A. B., on the 1st day of January, 1911, at the city of Winnipeg, in the Province of Manitoba, murdered C. D." The words "feloniously, wilfully and with malice aforethought," are omitted, for the obvious reason that these elements are implied in the word "murdered."

There is a bill pending before the Illinois Legislature providing that all indictments, complaints and informations shall be drawn in simple and concise language. Here is an example of an indictment for murder under this proposed act: "That A. B. on the first day of January, 1911, of his malice aforethought, with a certain axe, did assault and beat C. D. with intent to murder him, and by said assault and beating did kill and murder said C. D."

To the ordinary layman—to whom, argue to the contrary as we may, must ultimately be left the final determination of this question—these simple allegations would seem all-sufficient to enable either court or jury to apply the rules of substantive law to the case under the evidence and finally dispose of it.

Reform of procedure in this country was not attempted until the adoption of the New York code in 1848. This code was substantially followed in other States from time to time, until to-day there are about thirty so-called "code" States. But the codes have been ineffectual agents to secure the reforms sought to be accomplished. From about four hundred original sections in the New

York code the number has been increased from time to time until now they approximate four thousand sections. So with the other code States. The twenty so-called "common-law" States have been gradually receding from the strict letter of the common-law practice by more or less modification and amendment, but the end is not yet. Neither the code nor the modified common-law practice has brought us that simplicity made possible by the English Judicature Act referred to. The all-important question to the average citizen is to have a court where justice shall be administered cheaply, promptly and with certainty.

The technicalities of our criminal procedure seem to be more incomprehensible and far-reaching in their results than the technicalities on the civil side of our law. As in civil cases, every criminal case may go through two or more courts before it is finally determined. In the first court only (the trial court), however, is the guilt or innocence of the accused ordinarily the subject of inquiry. The other courts are courts of review, and their attention is devoted almost exclusively to questions of error. They are, indeed "the weed-pullers in the judicial garden," as Judge GROSSCUP says.

The right of a prisoner to appeal from a conviction is held sacred in this country. In England, until recently, there was never such a thing as a general right of appeal. The verdict was final. If anything further was to be said, the appeal was to the Crown for commutation or pardon, as the case might demand. Recently, in 1908, a court of Criminal Appeals was established by Parliament; but appeals to this court can only be taken by leave and not of right. And in this country many distinguished jurists and publicists, including President TAFT and the late Justice BREWER, have argued earnestly against the right of appeal in criminal cases.

But I am not arguing against this right. It has always seemed to me, however, that if the respondent has that right the people, before jeopardy attaches, should have it also; that their right to protection against an unjust or unwarranted verdict is equal, if not superior, to the right of the accused individual. The philosophy which places an undue emphasis upon individual rights rather than upon social duty is responsible, it seems to me, for this almost universal anomaly in our law. I believe, further, that to give the people the right to appeal in criminal cases would result, in many cases, in increased care in the trial of such cases by the trial courts.

The point I desire to make with reference to appeals is the fact that new trials are too often granted upon technical errors in criminal cases, not involving the merits, resulting in the liberation of many criminals of the most vicious type. And new trials in criminal

cases, for various and obvious reasons, are seldom successful to the prosecution. These technical errors of the trial court are given life and vitality by the adoption by many of our appellate courts of the rule already alluded to of presuming prejudice from error.

Many of the objections now urged could be avoided by the adoption of the Wisconsin rule as to appeals in criminal cases. There the legislature passed an act (Chap. 224 Laws 1909) giving the prosecution the right to review the rulings of the trial court before jeopardy has attached. This statute has been successfully invoked in at least one instance.[17]

Many cases found in the reports of almost every State in the Union show the absurd lengths to which our courts have gone in an endeavor to follow the antiquated rules of procedure of a former period which, it seems to me, long since should have been declared obsolete. They no longer have any place in our system of jurisprudence. The occasion which gave rise to their adoption passed by two centuries and more ago. Instead of speaking to us of the present, they take us back to the time of the Stuarts in England; to the time when the most bitter strife was waged between the Crown and the people, when the great body of crimes were political or religious, and were mainly prosecuted for political ends; when, for the most trivial offense, the death penalty was exacted; when sheep-stealing, and stealing from a garden, or shooting a hare, was punished with the same vengeance as murder.

The whole case is clearly stated by Justice VANN[18] when he says: "The criminal law is fast out-growing these technicalities which grew up when the punishment for crime was so severe as, in many cases, to shock the moral sense of lawyers, judges, and the public generally. When stealing a handkerchief worth a shilling was punished by death and there were nearly 200 capital offenses, it was to the credit of humanity that technicalities should be invoked in order to prevent the cruelty of a strict and literal interpretation of the law. Those times have passed; for the criminal law is no longer harsh or inhumane, and it is fortunate for the safety of life and property that technicalities to a great extent have lost their hold."

We have abolished all the savagery of the old English common law of crime in our substantive law, but we have in large measure treasured as something sacred the procedure which the English judges of the time expressly devised to save men from that savage code.

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[17] State v. Brown, 143 Wis. 405, 127 N. W. 956.
[18] People v. Gilbert, 199 N. Y. 10.

Interesting illustrations of the length to which the courts of that day would some times go are related in the life of Lord Chancellor CAMPBELL. Lord CAMPBELL is quoted as saying that the common-law rule laid down by the judges, that there could be no larceny of anything connected with the soil, was framed by them to avoid the conviction and hanging of poor fellows who, from the highway, plucked a vegetable or fruit from the adjoining land; and he relates a case he heard where a man was tried for stealing horse hair and the evidence showed that he went into a stable one night and cut a horse's long, bushy tail, which he sold for the hair. The court held that if the jury would find that at the time the horse's hair was cut off he was tied to his manger by the halter, the prisoner would be entitled to an acquittal, as this would be finding that at the time of the severance the hair was affixed to the freehold.

I give below a few cases, most of them recent, out of hundreds that might be cited, illustrating what the modern procedural reformer means when he claims that the old technicalities are too often followed to the detriment of justice and progress.[19]

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[19] In each of the following cases convictions were set aside:

Because the indictment charged that the crime was committed on "a public road," and the evidence showed that, though constantly used as such, the road had never been dedicated to the State. (State v. Jonson, 1 Ga. App. 195, 58 S. E., 265.)

Because one member of the firm of three names, from whom the goods had been stolen, was dead, and the indictment named all three. (Franklin v. State, 53 Tex. Crim. 547, 110 S. W., 909.)

Because the indictment had charged the burglar with intent to commit "a theft" instead of intent to commit "a felony." (Williams v. State, 53 Tex. Crim. 2, 108 S. W. 371.)

Because the indictment charged that the thief had entered the house of one "Wyatt" with intent to steal from him, and the defense was able to prove that one "Lamb" also occupied the house and it was Lamb's property the thief was looking after. (Roberson v. State, 51 Tex. Crim. 335, 101 S. W. 800.)

Because the accused was indicted for attempting to murder "Kamegay" instead of "Kornegay," the real name. (Haygood v. State, 51 Tex. Crim. 618, 103 S. W. 890.)

Because the indictment had not stated that a "blackjack" (designed especially for cracking skulls) was a dangerous or deadly weapon. (State v. Lett, 63 W. Va. 665, 60 S. E. 782.)

Because the prosecuting attorney, typewriter, or some employee, in complying with all the other requirements in alleging the offense, had omitted the words "was given" in referring to a mortal wound. (State v. Brown, 168 Mo. 449, 68 S. W. 568.)

Because the indictment for murder did not close with the useless phrase "against the peace of the State." (Fowler v. State, 155 Ala. 21, 45 South. 913.)

Because the indictment omitted the word "the" before "State" in the phrase "against the peace and dignity of the State." (State v. Campbell, 210 Mo. 202, 109 S. W. 706.)

Because the indictment did not clearly allege that the mortal blow was struck with a club, although it was alleged that a club was used and the proof showed how it was used. (State v. Woodward, 191 Mo. 617.)

Because in the indictment the defendant was charged with embezzlement from the "American Express Company, an association," when it should have been described as "a corporation." (People v. Brander, 244 Ill. 26, 91 N. E. 59.)

But it is also to be remembered that many of our appellate courts do not follow these technical rules, even in the absence of an express statute in relation thereto, and many cases might be cited in support of this statement. In one state (Connecticut) it is said that mistrials and discharge of criminals, notably guilty, on technical grounds, is almost, if not quite, unknown. This is attributed to the fact (1) that judges and prosecuting attorneys are not elected (the latter being appointed by the judges), and (2) the absence of a penal code or code of procedure; the entire body of penal law and procedure being embodied in 88 pages of only 453 sections.[20]

Not since 1827 has an indictment been held bad in England because of such trivial matters of form as found in the cases cited; because the English law of crime, being no longer bloody, no longer requires such construction to shield its victims. No more does our law of crime require such technical construction, and many of our courts are trying to say so in no uncertain terms.

I believe that the period in our practice, when substance is sacrificed to form and end subordinated to means, is passing away, and that we are entering upon a period in which substance shall prevail and the machinery of justice made to serve the end for which it exists. No one will seriously contend, however, that the law shall be administered without some due form and ceremony and by systematic rules which shall insure the orderly dispatch of business and secure not only justice to litigants, but uniformity of decisions. But these rules of procedure should exist only to secure to all parties an opportunity to make out a case and present a defense thereto.

The problem is how to make rules of procedure rules to help litigants, not instruments of strategem for the bar. Nor is it my

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Because the records recited that the "court" instead of the "presiding judge" drew the jury. (Scott v. State, 141 Ala. 39.)

Because the record showed that the defendant, otherwise duly convicted of murder, was absent from the court-room when the jury rendered its verdict. (Harris v. State, (Ala.) 49 South. 458.)

Because on an indictment, trial and conviction for murder, the trial court erroneously instructed the jury that it might find a verdict for manslaughter, a lesser offense. Although favorable to the defense, it was held error, and on a new trial former jeopardy was successfully pleaded. (People v. Huntington, 138 Cal. 261.)

Because the word "there" was omitted from the indictment. (Riggs v. State, 26 Miss. 51.)

Because the word "did" was omitted from the indictment. (Cook v. State, 72 Miss. 517.)

Because the word "and" was used in the indictment when it should have been "or." (Taylor v. State, 89 Miss. 671.)

Because the indictment charged burglary in a house occupied by six persons, while the proof showed that it was occupied by only five. The Supreme Court held the variance fatal. (Grantham v. State, 59 Tex. Crim. 556, 129 S. W., 839.)

[20] 2 Jour. Crim. Law and Criminology, 4.

purpose to criticise the correctness of the decisions of those courts following the technical rules of the common law. They were impelled to these decisions no doubt by the rules they believed they were bound to follow in the performance of their duty. Condemnation must rest, if at all, not wholly upon the courts, but rather upon the system of procedure which makes such decisions necessary or possible. The remedy is not through the courts, but through the legislature, the people's representatives, who may, by a single act, change the mode of procedure in any State.

By this I do not mean that the legislatures of the several States should attempt to lay down sundry rules for the conduct of legal proceedings. Whatever may now be said of the common law rules, they were in their time suited to the purpose intended and formed a logical and related system based on general principles and with a well-defined aim. Frequent modification by codes and other legislation in this country has resulted only in a multiplication of the difficulties. The attempt of legislatures to regulate by specific and minute statutory enactment all the details of court procedure has always been, and will continue to be, unavailing, cumbersome and unsatisfactory. The situation is clearly stated by Senator Root in his recent address at the New York Bar Association: "Such a policy never ends. The attempt to cover by express specific enactment every conceivable contingency, inevitably leads to continual discovery of new contingencies and unanticipated results, requiring continual amendment and supplement. * * * * I submit to the judgment of the profession that the method is wrong, the theory is wrong, and that the true remedy is to sweep from our statute books the whole mass of detailed provisions and substitute a simple practice act, containing only the fundamental rules of procedure, leaving all the rest to the rules of the court. When that is done, the legislature should leave our procedure alone. * * * * * * The judges are perfectly competent to regulate the procedure before them by their own rules, which they can adapt to the requirements of the cases that arise, so that whatever is necessary in any case to secure the ascertainment of the facts and the application of the law to them shall be done, and so that nothing else shall be required."

It seems to me that the suggestions here made are sound and unanswerable. With the passage of a simple practice act, placing the responsibility of regulating court procedure upon the courts themselves, the adoption by the several States of statutes similar to the federal statute recently passed, providing that no reversal shall be had except for errors affecting the merits, and the restoration of the

common law powers of the trial judges, with the right to summarize and comment upon the evidence, as is now done in our federal courts, will carry us a long way toward the realization of the fruits of the present movement for procedural law reform.

Coming down to us through the centuries are the words of the Magna Charta, wrenched from King John by the people—"You shall not sell justice; you shall not delay justice; you shall not defeat justice!"

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